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JUL 25 1968
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No. 339

In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1968.

JOE EDWIN MILLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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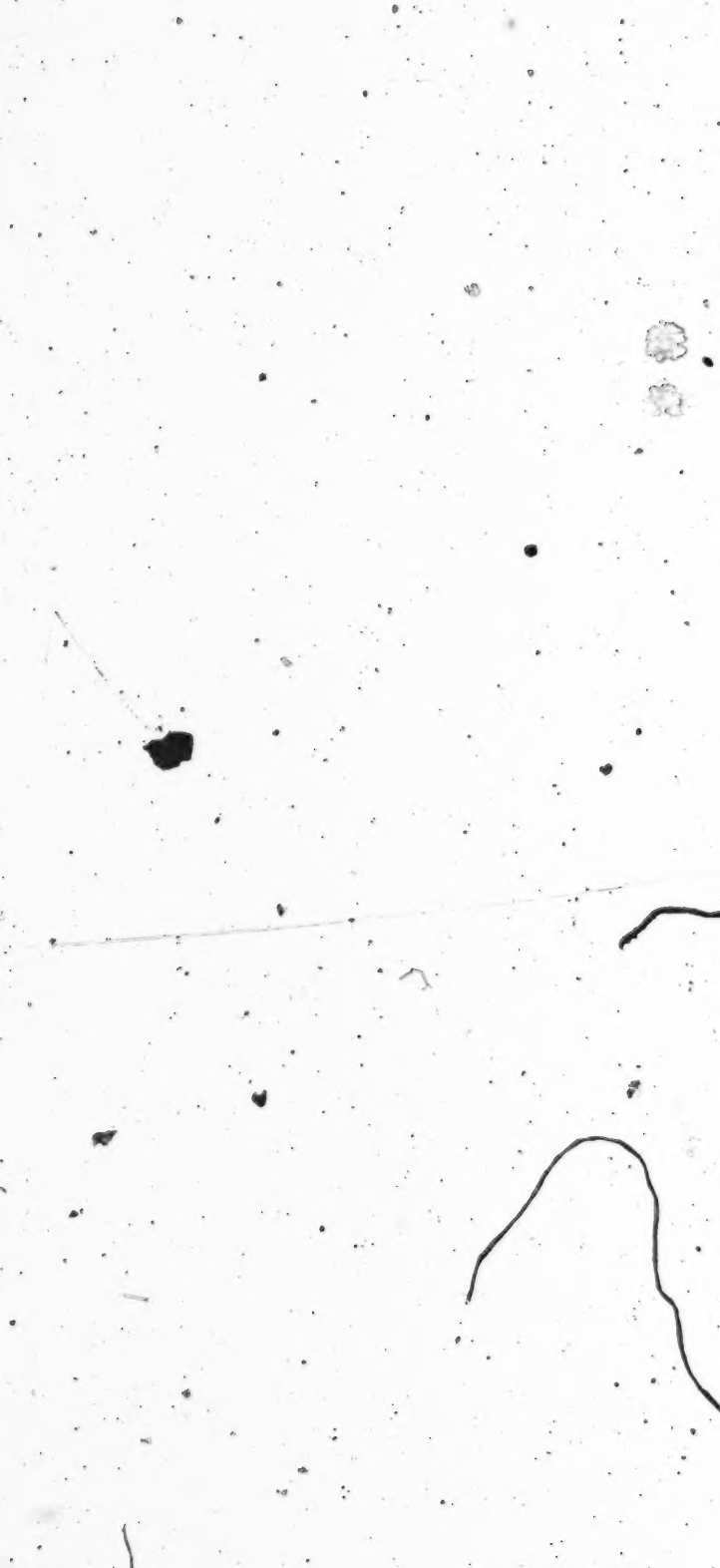

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To The Chief Justice Of The United States And The Associate Justices Of The United States Supreme Court:

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Seventh Circuit which affirmed the judgment of the United States District Court for the Southern District of Indiana finding petitioner guilty of the crime of receiving goods stolen from an interstate shipment in violation of Title 18, United States Code, Section 659 and sentencing him to a term of one year (ten months of which were suspended) and fining him in the amount of Twenty-Five Hundred Dollars ($2500.00).

THE OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in the instant case was unreported as of the date that this petition was sent to the printer. A copy of the opinion is hereto annexed in Appendix A. A Petition For Rehearing was filed and denied as is shown by Appendices B & B-1.

STATEMENT OF JURISDICTION

The decision and judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 24, 1968. A petition for rehearing was then filed within the time allowed by the rules of the said lower court and the same was denied on June 26, 1968.

The statutory provision believed to confer upon this Court, jurisdiction to review the judgment in question by Writ of Certiorari is Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Government and each of its branches bears the same obligation to afford equal protection of the law to each of its citizens that the Supreme Court of the United States has found to exist with respect to the several states in its interpretation of the Fourteenth Amendment to the Constitution of the United States which appears in its decisions in *Griffin* v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) and *Lane* v. *Brown*, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892 (1963).

2. Whether Rule 17d of the United States Court of Appeals for the Seventh Circuit in the context of the other rules of the said Court denies equal protection of the law on the basis of economic status.

3. Whether the question of sufficiency of the evidence to sustain a conviction may be raised in a Federal Criminal appeal and, if so, whether due process of law is afforded where such an attempt by a criminal appellant is dismissed, without consideration as "absurd."

4. Whether due process is afforded a citizen where he is convicted and sentenced to prison solely on the basis of evidence that he purchased goods which were stolen and which happened to have been stolen from an interstate shipment without a scintilla of evidence showing awareness of a federal harm.

5. Whether the rights of a citizen against unreasonable search and seizure can be voluntarily waived by a citizen who is confronted with four F.B.I. agents who appear at his front door and identify themselves as F.B.I. agents and ask "May we come in?"

CONSTITUTIONAL PROVISIONS INVOLVED

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched.

Constitution of the United States, Amendment 4.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due

process of law; nor shall private property be taken for public use without just compensation.

Constitution of the United States, Amendment 5.

USAGES BEING QUESTIONED

It shall not be necessary to print the record on appeal or on review. All appendices, briefs, or other papers printed for the use of the court, if produced by ordinary typographic methods, must be in such form and size that they can be conveniently bound together so as to make an ordinary octave volume having pages 6 1/8 X 9 1/4 inches and type matter 4 1/6 inches by 7 1/6 inches, except that appendices and briefs in patent cases may be printed in such size as is necessary to utilize copies of patent documents: viz., 7 ½ by 10 inches. They and all parts thereof, including index, list of authorities, footnotes and all quotations contained therein, and the matter appearing on the covers, must be printed in clear type adequately leaded; and the paper must be opaque and unglazed.

Rule 17f, United States Court of Appeals For The Seventh Circuit.

In lieu of submitting a printed appendix or brief as prescribed by Rule 16 (a) and (f), a party may, at his option, reproduce the appendix or his brief or both by multigraph or offset duplicating method. The record and brief so produced shall be on opaque unglazed paper, size 7½ X 10 inches, with margins of at least 1 inch, except that the left-hand margin shall be 1½ inches. No volume shall contain more than 300 pages. Each volume shall be neatly stitched on the left-hand side and have a cover on both front and back. Type matter shall be double-spaced except for quotations, which may be single spaced and indented. The clerk shall refuse to accept for filing any copies which are not clear and readable.

Rule 17g, United States Court of Appeals For The Seventh Circuit.

Unless permission is obtained from the court or a member thereof, the clerk will not receive a brief of either party of more than 75 pages. The parties shall be referred to as "plaintiff" and "defendant".

Rule 17d, United States Court of Appeals For The Seventh Circuit.

STATEMENT OF THE CASE

Petitioner was indicted on June 9, 1966 by the Grand Jury for the Southern District of Indiana on a charge of violating Title 18, United States Code, Section 659. On July 28, 1966 petitioner was arraigned and then on August 2, 1966 he filed a Motion To Suppress Evidence which subsequently was heard and overruled. Then, on January 18, 1967 the petitioner was tried before a jury which returned a verdict of guilty. A timely appeal was then taken to the United States Court of Appeals for the Seventh Circuit and, two days before the filing of the petitioner's Appellant's Brief the petitioner filed a Petition For Permission To Dispense With Rule 17d And Combine Appendix and Brief which read as follows with the caption and title excluded:

> Comes now the petitioner in the above entitled cause, by Counsel, and respectfully moves the Court for permission to dispense with Rule 17d for the reason that the Brief will be rather voluminous because there are constitutional questions involved in said appeal which are more extensive than were anticipated, and as a result thereby, said Brief will be in excess of 75 pages; that the best estimate of Counsel is that the Brief will be of the approximate length of 100 pages. Petitioner further says that said Brief is on the merits and presents substantial questions of law and that the petition herein is not frivolous.
>
> Counsel for Petitioner further says that it will be more expeditious and will result in greater clarity

in the preparation of said appeal if said Court will allow said Appendix and Brief to be in a single volume, and Counsel further respectfully prays the Court for permission to embody the Appendix and Brief in a single volume in this appeal.

That the submission date for the Brief and Appendix in this cause is January 27, 1968, and Counsel respectfully prays the court for a ruling hereon at the earliest possible time so that appropriate arrangements can be made herein.

In response to the above-quoted motion the Seventh Circuit entered an order to the following effect:

> IT IS HEREBY ORDERED that the petition of counsel for defendant-appellant for permission to dispense with Rule 17d and combine appendix and brief, filed herein on January 8, 1968 be and the same is hereby *denied.* (Emphasis not supplied)

The aforesaid ruling of the United States Court of appeals was entered in January 10, 1968. Subsequent to said order the following Verified Petition To Dispense With Rule 17d was filed by the petitioner, through counsel:

> Appellant by counsel, respectfully moves this Honorable Court for permission to dispense with Rule 17d with reference to the length of the main brief and would respectfully show this Honorable Court that he had heretofore filed in this Court, a Petition For Permission to Dispense With Rule 17d with reference to the combining of the brief and appendix, but that the same was on January 10, 1968, denied.
>
> Counsel would further represent to this Honorable Court that due to the pressure and volume of other appeals in this Court, namely, the main brief in a cause entitled "United States of America v. Sidney Rowlette and Robert Vecelli" and another appeal in a cause entitled "United States of America v. Robert Vecelli," both causes being appealed from the United States District Court for the Northern District of

Illinois, Eastern Division, Chicago, Illinois, plus a main brief just recently completed for the Tenth Circuit, Denver Colorado, in a cause entitled "United States of America v. Sidney Rowlette", that there has been great confusion and uncertainty because of the preparation of the briefs and the printing of the same with reference to the number of pages in the instant appeal of Joe Edwin Miller and that Counsel just found out this 24th day of January, 1968, by information obtained from J/W Printing, Red Jenkins, President, at the printing establishment at 1417 N. Illinois Street, Indianapolis, Indiana, that the length of the main brief in this instant cause is in excess of 75 pages which fact can be corroborated by Bertha Jones, the chief legal secretary of Counsel.

That this information just came to the attention of Counsel who for the past three days was busily engaged in litigation in the United States District Court for the Southern District of Indiana, Indianapolis, Division in a 2255 Petition entitled Donald Allen Kiger v. United States of America and which was just completed on this 24th day of January, 1968 at approximately 1:45 P.M. and that this is the first time this information was imparted to Counsel.

That Counsel makes this request at the earliest possible time after the discovery of the same.

That this Motion To Dispense With Rule 17d is not frivolous, that substantial questions are being presented and raised in this appeal and that it would work irreparable damage and hardship and would be most injurious to Defendant-Appellant Miller if this motion were not granted because there is not sufficient time to prepare another brief, and/or the printing thereof, in sufficient time because the date of the filing of this brief is Friday, January 26, 1968.

WHEREFORE, William C. Erbecker, as Attorney for Joe Edwin Miller, respectfully prays this Honorable Court, because of the emergency features of this case, to permit Defendant-Appellant and Counsel to dispense with Rule 17d and to permit the filing of

a brief in excess of 75 pages for the reasons hereinabove set out.

Then on January 26, 1968, the United States Court of Appeals for the Seventh Circuit made the following entry in its record:

> On consideration of the verified petition of counsel for defendant-appellant to dispense with Rule 17d with reference to the length of the main brief of defendant-appellant filed herein on January 26, 1968, it coming to the attention of the Court that the attorney for the defendant-appellant has disregarded the previous order of this Court dated January 10, 1968, denying said attorney's request to file a brief for the defendant-appellant in excess of seventy-five (75) pages, the petition to dispense with Rule 17d, (counsel having tendered for filing a brief of 150 pages) is taken with the case to be considered at the oral argument. However, said brief now tendered for filing is ordered filed provisionally, and the United States of America, plaintiff-appellee, shall have thirty (30) days to file an answer brief unless said time is extended.

Then, on May 24, 1968, the Seventh Circuit rendered its opinion in this cause which appears hereinafter in Appendix A. Thereafter the petitioner filed his Petition For Rehearing which appears hereinafter in Appendix B, calling to the Seventh Circuit's attention the fact that its opinion showed on its face a total disregard of the arguments presented in the Petitioner's main brief relating to the petitioner's rights under the Fourth Amendment to the Constitution of the United States and his right to have an appellate adjudication on the question of whether a prima facie case has been presented against him at the trial. The Petition For Rehearing was denied on June 26, 1968 and this attempted appeal is taken from that denial and the prior decision herein.

REASONS FOR GRANTING THE WRIT

It is no overstatement to say that the petitioner's main contentions on his direct appeal were summarily disposed of without discussion on the merits in the written opinion of the Seventh Circuit. It would be difficult to hypothesize a disposition more summarily executed than the disposition of the petitioner's contention that a prima facie case was not presented against him in the trial court:

> We need not dwell on defendant's additional contention that defendant was convicted ". . . upon suspicion and conjecture and nothing more." Possibly such a claim might be considered permissible as an argument to a jury where wide latitude is given. However, in view of the undisputed evidence on this trial, it is absurd to make such an argument to this Court. The judgment of conviction is affirmed.

The above-quoted portion of the Seventh Circuit's opinion was a mere repetition of what had been stated by the Government in its main brief as is shown hereinafter in Appendix B. The Seventh Circuit's conclusion apparently was reached without benefit of the argument in the petitioner's main brief because of the "defect" which the Seventh Circuit found in the lengthiness of said brief.

For from being "absurd" the Petitioner's contention that his conviction was based upon mere suspicion with respect to the requisite element of intent where there is no evidence or even attempted proof that there was scienter of the federal harm directed itself to a question which long has been a matter of conflict between the circuits.

> One of the main assignments of error is that the evidence was insufficient to connect these three defendants with the conspiracy, and with knowledge that the stolen cars involved were, or were to be trans-

> ported in interstate commerce. . . . There are a number of circumstances which would lead to the suspicion that both Linde and Brown knew that the cars sold or trusted to them were stolen cars, but it does not appear that they knew whence they came or were to come. . . . That they may have had guilty knowledge and participation rests upon suspicion only.
>
> *Linde* v. *United States,* 13 F.2d 59 (8th Cir. 1929)

> We are unable to reconcile the case of Linde v. United States, 13 F.2d 59 (South Dakota) with either the statute above quoted or the cases of Katz v. United States (C.C.A.) 281 F 129 (Ohio), Rosen v. United States, (C.C.A.) 271 F 651 (N.Y.) and Kasle v. United States (C.C.A.) 233 F. 878 (Ohio). Under the statute and these last named cases, if appellant had been charged with having received a stolen automobile which was moving in interstate commerce, knowing the same to have been stolen it would not have been necessary to allege or prove that he knew it was a part of interstate commerce.
>
> *Wilkerson* v. *United States,* 41 F.2d 655, 656 (7th Cir. 1930)

To be sure, the question on sufficiency presented by the petitioner's main brief previously had been decided in the Seventh Circuit by an affirmative answer to the legal question of whether a participant in a federal property violation must have scienter with respect to the federal nature of the offense before he can be guilty of the offense. But it has been decided to the contrary in other circuits and it has, since the *Wilkerson* case, been resolved to the contrary by leading authorities.

> The federal government may not punish offenses except those which affect areas within its constitutional control just as it may not punish a larceny merely because that physical act is harmful to society. . . . It

must be a "general federal danger rationale and anti-federal intent is therefore required. This argument is based upon the assumption that the reason for punishing must be the basis of jurisdiction to punish 72 Harvard Law Review 938.

The conviction of the petitioner herein was based upon the fact that he purchased a color television set which was brand new and still in the packing crate, paying far below the wholesale price and having it delivered to his home late at night. There was no attempt at proving that he knew from whence the television set came or that he had reason to believe that it came from an interstate shipment, the necessary element to render the matter federal. The proof was directly only to the question of whether he knew or realized that the television set was or must have been stolen.

It is submitted that the foregoing question was a very substantial one and that the Seventh Circuit's characterization of it as "absurd" on the basis of that characterization appearing in the government's circumloquitious brief within even a perusal of the petitioner's main brief because of its length constituted a denial of procedural due process of law unless there was an adequate reason for the Seventh Circuit to decline to consider the petitioner's main brief. The question of whether the Seventh Circuit had such an adequate reason is discussed hereinafter.

With respect to the question of whether the petitioner's rights under the Fourth Amendment to the Constitution of the United States had been violated the holding of the Seventh Circuit in effect was that there is no violation implicit where there is a consent search notwithstanding the fact that consent was obtained by having no less than four F.B.I. agents appear at the petitioner's front door, unannounced and asking for consent. The petitioner's con-

tention was and is that a verbal expression of consent is meaningless in a situation which necessarily is intimidating.

> A layman may not fiind it expedient to hazard resistance on his own judgment of the law at a time when he cannot know what information, correct or incorrect, the officers may be acting upon.
>
> *United States* v. *Di Re*, 332 U.S. 581, 68 S.Ct. 222, 228.

If certiorari is granted herein the Petitioner will urge the proposition of law that it is intimidating per se for more than two police officers to approach an individual at his home and request consent to a search.

The preceeding presentation is primarily for the purposes of demonstrating that the petitioner did present substantial questions to the Seventh Circuit in his direct appeal and that the denial of the petitioner's right of allocution by and through his main brief was a denial which seriously effected his rights and which should require reversal if there was no reasonable basis for justifying the said denial.

The aforesaid denial was based upon the rules of the Seventh Circuit which are set forth in the "Usages Being Questioned" portion of this petition. It was demonstrated to the Seventh Circuit in the Petition For Rehearing that the form of the petitioner's brief enabled him to place only half as many words on each page of his brief as could have been printed on the more expensive type of brief (See Appendix B) and that his entire brief would have been within the rules of the Seventh Circuit if the brief had been printed by the more expensive process. The Seventh Circuit persisted in its denial of allocution notwithstanding the aforesaid presentation.

Petitioner believes it to be self-evident that Rule 16g of the Seventh Circuit which provides for the filing of typewritten briefs was adopted for the purpose of providing appellants of less than average means who are not paupers with the opportunity to present their appeals to that court the same as appellants of average or better than average means. The necessity for this alternate means of publishing a brief is readily apparent in view of the decision of this Court for *Griffin* v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585, 591, 100 L.Ed. 891:

> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.

The rules of the Seventh Circuit which are set forth in the "Usages Being Questioned" portion of this petition, by limiting both types of brief to the same number of pages and requiring that all typing except quotes be double-spaced, require any appellant who cannot afford to have his brief published by the more expensive method to limit his argument to half the length of the argument which could be presented by an appellant of average means or which inevitably is presented by the government in criminal appeals because the government's briefs always are printed. Thus, these rules limit a criminal appellant's argument to half the length of the government's argument unless the criminal appellant is, himself, financially able to match the government's resources.

Petitioner recognizes that the equal protection clause of the United States Constitution upon which this Court's decision in *Griffin* v. *Illinois*, supra, is based applies only to the states and not to the federal government. But it is submitted that the Ninth Amendment to theUnited States Constitution which provides that "The unumeration in the constitution, of certain rights, shall not be construed to

deny or disparage others retained by the people" renders *Griffin* v. *Illinois* as applicable to the federal judicial system as it is to the state judicial system and when the said amendment is taken together with a reading of the Constitution as a whole, the fact that the Constitution shows no inclination to permit greater federal discretion in matters affecting the rights of individuals than is afforded to the states compels the conclusion that the federal government, including its courts, is as much obligated to provide equal protection to criminal defendants of different economic means as the states. In recognition of this, much has been done by the federal judiciary and by Congress to protect pauper defendants from being deprived of their rights by their impecunious state, but little or no need has been given to the problems of those who, while they are not paupers, necessarily must economize in undertaking an appeal. Rule 16g of the United States Court of Appeals for the Seventh Circuit, insofar as it provides an alternate and cheaper form for publishing a brief in an appeal to this Court, does pay heed to the said problem but, insofar as the rule when taken in conjunction with Rule 17d of the Seventh Circuit requires the user of the cheaper type of pinted brief to forego one-half of his presentation, the said rules are unconscionable and in this case they effectively operated to deprive Petitioner of equal protection of the law and procedural due process of law.

CONCLUSION

For the reasons above stated, this petitioner has been denied his constitutional rights to a fair, impartial and legal proceeding during and after his trial and on his appeal.

It is, therefore, respectfully submitted that Certiorari should be granted and that the decision of the United States Court of Appeals for the Seventh Circuit should be reversed, or in the alternative, that this Court should vacate said judgment and remand this cause to the United States Court of Appeals for the Seventh Circuit for further proceedings not inconsistent with an appropriate opinion.

Respectfully submitted,

WILLIAM C. ERBECKER
Attorney for Petitioner